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No. 93-1539

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

STATE OF LOUISIANA, *et al.*,
Appellants,

v.

RAY HAYS, *et al.*,
Appellees.

On Appeal from a Three Judge Panel of the United States District Court for the Western District of Louisiana

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RESPONSE TO THE STATE OF LOUISIANA'S BRIEF REGARDING MOOTNESS

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This appeal is not moot, for four separate reasons articulated in the Argument portion of this Response. Louisiana now contends that its own appeal of a district court order invalidating its bizarre, uncouth, congressional districting scheme has been mooted by the enactment of a new regime in response to that very order. *See* Act No. 1, Louisiana 1994 Second Extraordinary Legislative Session ("Act No. 1"). Instead of simply dismissing its appeal, the State would have this Court dismiss the appeal for mootness, apparently in hopes that it can secure vacatur of the lower court's adverse decision. *See Appellants' Supplemental Brief Regarding Mootness* at 2-3 ("*Mootness Brief*"). As demonstrated below, Louisiana's strategic attempt to employ mootness doctrines to

undermine an unfavorable trial-court decision directly conflicts with this Court's mootness jurisprudence.

PROCEDURAL BACKGROUND

Plaintiffs in this case, citizens of the State of Louisiana, brought an equal protection challenge to that State's congressional districts. Plaintiffs argued that the districting scheme adopted in response to the 1990 reapportionment was unconstitutional as a purposeful segregation of voters on the basis of race. On December 28, 1993, a special three-judge panel of the United States District Court of the Western District of Louisiana agreed. In a careful, well-reasoned opinion, the three-judge court struck down the districting scheme and enjoined the State from conducting any future elections pursuant to it. Now, the State argues that its appeal of that decision has been mooted by the recent enactment of Act No. 1—the congressional districting plan created to replace the one invalidated by the district court.

At the outset, Louisiana implies that the work of the court below is at an end. *Cf. Mootness Brief* at 2. That is not so. In their prayer for relief, plaintiffs specifically asked that the Louisiana legislature be compelled to "effectuate a lawful plan" under the Equal Protection Clause and the Voting Rights Act. Complaint, Prayer for Relief ¶ 5. To date, the district court has not held the new districting regime "lawful," nor has it denied plaintiffs-appellees' prayer for relief. Until either event occurs, enactment of a new plan means only that the case has entered a new remedial phase, not that it is over.

ARGUMENT

This Court should reject Louisiana's mootness claim on four separate grounds.

First, under the circumstances presented here, the mootness issue is controlled by *Whitcomb v. Chavis,* 403 U.S. 124 (1971). *Whitcomb* presented an equal protection challenge by African-American voters to an Indiana legislative districting scheme. While the case was pending before this Court, the Court was "advised by the parties that the Indiana Legislature had passed, and the Governor had signed, new apportionment legislation soon to become effective for the [upcoming] elections." *Id.* at 140. In response to this turn of events, the Court held that the case was "not moot." *Id.* at 141. It relied on the fact that "the District Court . . . retained jurisdiction to pass on the legality of subsequent apportionment statutes" and that "the issue involved in the present litigation would simply reappear for decision" were the case mooted. *Id.* at 140-41. Here, as in *Whitcomb,* the district court retains jurisdiction, and the issues presented by this appeal will inevitably reappear as that court considers subsequent plans, such as the regime embodied in Act No. 1 now trumpeted by the State. But Act No. 1 signals only the beginning of a new chapter in this litigation, not the end. The case remains actively, vibrantly, alive.[1]

Second, it is well established that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *Northeastern Fla. Chapter of Associated*

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[1] Indeed, the district court has acknowledged the continuing vitality of the case; it did so in *denying* plaintiffs' motion to impose a deadline for legislative enactment of a constitutional plan. *Hays v. Louisiana,* No. CV 92-1522 S (W.D. La. Jan. 20, 1994). Had the court considered the case closed, as Louisiana implies, *cf. Mootness Brief* at 2, it would have *dismissed* plaintiffs' motion or otherwise indicated that it was not in order.

Gen. Contractors of Am. v. City of Jacksonville, 113 S. Ct. 2297, 2301 (1993) (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982)).[2] At least since *City of Mesquite*, the Court has applied this principle to challenged legislative acts. Its reason for doing so is straightforward: A defendant's "repeal of [constitutionally] objectionable language would not preclude it from reenacting precisely the same provision if the District Court's judgment were vacated." *City of Mesquite*, 455 U.S. at 289.

This salutary principle was reiterated by this Court in *Northeastern Florida Contractors*. There, a contractors association mounted an equal protection challenge to a Jacksonville ordinance according preferential treatment to certain minority-owned businesses in the awarding of city contracts. After this Court granted certiorari, Jacksonville repealed the challenged ordinance and replaced it with an alternative scheme to ensure minority participation in city contracts. *Northeastern Fla. Chapter of Associated Gen. Contractors of Am.*, 113 S. Ct. at 2300. Concluding that the case was "not moot," the Court examined the character of the replacement legislation:

> This is an *a fortiori* case. There is no mere risk that Jacksonville will repeat its allegedly wrongful conduct; it has already done so. . . . The gravamen of petitioner's complaint is that its members are disadvantaged in their efforts to obtain city contracts. The new ordinance may disadvantage them to a lesser degree than the old one, but . . . it disadvantages them in the same fundamental way.

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[2] *City of Mesquite* involved a challenge to a city ordinance regulating licensing of amusement establishments. The District Court struck down a portion of the ordinance requiring the city to consider an applicant's "connections with criminal elements" when deciding whether to grant a license. While the case was pending before the Court of Appeals, however, the contested language was eliminated from the ordinance. On certiorari, this Court relied upon established voluntary-cessation principles and held that the case should not be dismissed as moot.

Id., at 2301. Where replacement legislation remains at all constitutionally suspect, a court is precluded from finding that it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur"; hence, it is precluded from finding mootness. *City of Mesquite*, 455 U.S. at 289, n.11 (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953)).

In this case, a preliminary review of the new Louisiana districts suggests that they may have been drawn along racial lines in a way that needlessly transgresses parish boundaries. Plaintiffs have already challenged the new districting plan in the district court and have asked the district court to enjoin the State from holding elections under the new regime. Motion for Preliminary Injunction and Adoption of an Interim Congressional Districting Plan for the 1994 Congressional Elections in the State of Louisiana, *Hays v. Louisiana*, No. CV 92-1522 S (W.D. La. Jun. 17, 1994). Thus, the dispute between plaintiffs and Louisiana has not abated. Under such circumstances, this Court should apply the rule of *Northeastern Florida Contractors*.

Third, this Court has hesitated to allow defendants intentionally to undermine adverse court decisions through manipulation of mootness doctrines. For example, in a case where the Massachusetts legislature reacted to an adverse ruling in similar fashion—repealing and replacing a law that had been voided on constitutional grounds—a majority of this Court refused to find mootness. *See Massachusetts v. Oakes*, 491 U.S. 576, 585-88 (1989) (Scalia, J., concurring). Of course, the Court's holdings in this area might be viewed simply as applications of the familiar rule that issues are justiciable where they are "capable of repetition, yet evading review." *See, e.g., Moore v. Ogilvie*, 394 U.S. 814, 816 (1969) (quoting *Southern Pacific Terminal Co. v. Interstate Commerce Comm'n*, 219 U.S. 498, 515 (1911)).

Those principles are fully applicable here. The district court was constitutionally bound in this case to permit Louisiana to redraw its own districts. *See Growe v. Emison,* 113 S. Ct. 1075, 1080-81 (1993). Now that Louisiana has been allowed to act in the first instance, this Court is being told that the very actions taken to comply with the district court's order require that order's vacatur. Under Louisiana's view, a State may always disembowel a pesky decision simply by timing the completion of its role in fashioning a remedy to coincide with the appeal of the finding of a constitutional violation. That sort of legerdemain is in conflict not only with common sense, but also with the precept that compliance with a judgment pending appeal does not render a case moot. *See Gray v. Sanders,* 372 U.S. 368, 375-76 (1963); *see also* Robert L. Stern et al., Supreme Court Practice 718 (7th ed. 1993). Under any of several doctrines, then, this case should be resolved on the merits.[3]

Fourth, even if Louisiana could overcome this Court's mootness precedents, it still should not win the vacatur garland it so assiduously seeks. Although vacatur can be appropriate where a case is mooted on appeal through "happenstance," *see United States v. Munsingwear,* 340 U.S. 36, 39-40 (1950), this "*Munsingwear* procedure is inapplicable" where the "controversy did not become moot due to circumstances unattributable to any of the parties."[4] *Karcher v. May,* 484 U.S. 72, 83 (1987). Simply

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[3] The precedents relied on by Louisiana, *see Mootness Brief* at 3, are inapposite. In *Hall v. Beals,* 396 U.S. 45, 49 (1969), the plaintiffs had challenged a state residency requirement that, upon amendment, no longer adversely affected them; likewise, *Berry v. Davis,* 242 U.S. 468 (1917)—a seventy-seven-year-old, mandatory-vasectomy case—also involved a situation where "the substituted act," *i.e.,* the amended law, did "not apply to the plaintiff." *Id.* at 470. Here, by contrast, the new districts apply to these plaintiffs, and their injury will continue undiminished until a lawful districting plan is in place.

[4] This Court expected to have occasion earlier this term to address *Munsingwear*'s application to cases rendered moot by a set-

put, "[an] appellate court should not vacate the judgment below if the case has become moot due to the voluntary act of the losing party." *Manufacturers Hanover Trust v. Yanakas*, 11 F.3d 381, 383 (2d Cir. 1993) (Kearse, J.) (*citing Karcher*); *accord New Left Educ. Project v. Board of Regents of the Univ. of Texas Sys.*, 472 F.2d 218 (5th Cir.), *summarily rev'd Board of Regents of the Univ. of Texas Sys. v. New Left Educ. Project*, 414 U.S. 807 (1973). "If [courts] were to vacate where the party that lost in the district court has taken action to moot the controversy, the result would be to allow that party to eliminate its loss without an appeal and to deprive the winning party of the judicial protection it has fairly won." *Manufacturers Hanover*, 11 F.3d at 383. Because it was Louisiana that took the action that purportedly mooted this appeal, Louisiana can not rely on that action to overturn a decision adverse to it.[5]

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tlement agreement, but it was forced to dismiss as improvidently granted the petition for certiorari in the case presenting the issue. *Izumi Seimitsu Kogyo Kabushiki v. U.S. Philips Corp.*, 114 S. Ct. 425 (1993). The Court is again scheduled to address settlement-prompted vacatur next term in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 114 S. Ct. 681 (*cert. granted* Jan. 10, 1994) (No. 93-714). There, the Court has directed the parties to brief and argue the question: "Should the rule announced in *United States v. Munsingwear*, 340 U.S. 36 (1950), extend to cases that become moot in this Court because of the voluntary settlement of the parties?" *U.S. Bancorp*, No. 93-714 (Mar. 28, 1994). Because Louisiana's mootness allegations in this case are not based on a settlement agreement, cases such as *Izumi* and *U.S. Bancorp* have no application here.

[5] Nor is the short opinion *per curiam* in *Crowell v. Mader*, 444 U.S. 505, 506 (1980), to the contrary. In *Crowell*, a party who had *prevailed* below and who had not been responsible for the intervening events giving rise to apparent mootness presented a mootness claim to this Court. Because in these circumstances the possibility of strategic behavior was not presented, the Court acceded that party's request for dismissal for mootness and ordered vacatur. Here, by contrast, appellees vigorously deny that the case is moot and urge this Court to reach the merits.

CONCLUSION

For the reasons set forth above, this Court should not vacate as moot the judgment of the district court. Rather, because neither the State of Louisiana nor the United States has presented any substantial arguments to the contrary, this Court should summarily affirm the district court's judgment.

Respectfully submitted,

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